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In The

Supreme Court of The United States

October Term 1997

MICHAEL GREB AND CHARLES J. REIGHARD,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

with Appendix

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56 pp

QUESTIONS PRESENTED FOR REVIEW

1.

Whether the right to a trial by jury, guaranteed by the Seventh Amendment to the United States Constitution, has been abrogated by the United States Court of Appeals for the Sixth Circuit for the states within the Sixth Circuit, in that federal district judges within the Sixth Circuit are free to grant summary judgment against plaintiffs with impunity with absolutely no fear of reversal.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Sixth Circuit.

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In The Supreme Court of the United States
October Term 1997

MIKE GREB

and

CHARLES REIGHARD
Petitioners,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

Appeal to the United States Court of Appeals for the Sixth Circuit from the United States District Court for the Northern District of Ohio

---

PETITION FOR WRIT OF CERTIORARI

Michael Greb and Charles Reighard, the petitioners herein respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on December 9, 1997.

OPINIONS BELOW

The December 9, 1997 decision of the United States Court of Appeals for the Sixth Circuit, whose judgment herein is herein sought to be reviewed, was Case No.: 96-4286 decided on December 9, 1997 and is unreported, and is reprinted in the separate Appendix to this Petition, **App. A**. The prior opinion of the United States District Court for the Northern District of Ohio entered on October 23, 1996, was Case No.: 94-CV-1193 decided on October 23, 1996 and is unreported, and is reprinted in the separate Appendix to this Petition, **App. B**.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 9, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves the Seventh Amendment to the United States Constitution and Rule 56 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE
SUMMARY OF THE PROCEEDINGS

The Petitioners herein, MICHAEL GREB and CHARLES J. REIGHARD, filed the herein claim, on June 10, 1994, against Respondent GENERAL MOTORS CORPORATION, (hereinafter referred to as "GM"), alleging counts for relief based upon intentional tort (chemical exposure), fraud, intentional infliction of emotional distress and for medical surveillance in the United States District Court for the Northern District of Ohio.

Subsequent to the filing of an Answer, the matter was transferred to Magistrate Judge David S. Perelman, for further proceedings.

Several status conferences and pre-trials were held. A discovery order was entered.

Pursuant to said discovery plan, the issues presented were bifurcated as follows:

1. Discovery on the issue of intentional tort and fraud vis a vis the worker compensation defense was to be conducted in the first phase of discovery.

2. Issues relating to causation and injury were to be explored in the second stage of discovery, assuming the Plaintiffs/Appellants survived Defendant's/Appellee's Motion for Summary Judgment, on issues relating to the first stage of discovery.

On May 29, 1996, Defendant/Appellee GM filed a Motion for Summary Judgment, as to the issues relating to the first stage of discovery.

The Plaintiffs/Appellants, with permission of the Court, filed their joint Motion in Opposition, to Defendant's/Appellant's Motion for Summary Judgment.

The Trial Court granted Defendant's/Appellee's Motion for Summary Judgment on October 23, 1996. Petitioners timely filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit, which upheld the trial court's decision on December 9, 1997.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE UNITED STATES SUPREME COURT'S POWER OF SUPERVISION

Approximately 50% of all cases filed in district courts within the Sixth Circuit are disposed of by the trial court granting summary judgment against the plaintiff. The United States Court of Appeals for the Sixth Circuit uphold these summary judgment dismissals 100% of the time.

This amounts to a virtual abrogation of the right to a jury trial, guaranteed by the Seventh Amendment to the United States Constitution, within the states covered by the Sixth Circuit for federal cases.

In essence, federal judges within the Sixth Circuit are free to grant summary judgments against plaintiffs with impunity, for they can do so with virtually no fear of reversal by the U.S. Court of Appeals in the Sixth Circuit.

This amounts to a severe infringement on the right to a jury trial in federal courts within the Sixth Circuit, a right which is guaranteed by the Seventh Amendment to the United States Constitution.

Relevant case law clearly establishes that summary judgment should only be used as a surgical instrument to remove meritless cases, and not as an offense weapon to obliterate half of all cases filed in federal court. It is incredulous that the Sixth Circuit Court of Appeals has determined that half of all cases filed in federal court are baseless, and can never find one single case where a district court judge was in error when granting summary judgment.

The Sixth Circuit Court of Appeals has implemented a doctrine of infallibility to federal judges on their decisions involving summary judgments.

The United States Supreme Court has long held that federal judges should only grant summary judgments against plaintiffs with great caution. **Associated Press vs. United States, 326 U.S. 1 (1945)**. "We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them." **Id** at 6.

The Sixth Circuit has, in essence, turned the rule on summary judgment into summary trial proceedings, which are frowned upon by the United States Supreme Court. In the absence of express statutory authorization, courts should be extremely reluctant to allow proceedings more summary than a full court trial. **New Hampshire Fire Ins. Co. vs. Scanlon, 362 U.S. 404 (1960)**. When the issue is an ordinary dispute, "an everyday, garden-variety controversy that regular, normal court proceedings are designed to take care of," a person may have their "claim adjudicated by the

Federal District Court but that should be done in a plenary, not in a summary, proceeding." **Id.** at 410.

Summary judgment does not serve as a substitute for trial, nor can it be employed so as to require parties to litigate via affidavits, and it is drastic relief to be applied with caution. **Redhouse vs. Quality Ford Sales, Inc., 511 F. 2d 230 (10th Cir. Utah 1975)**. Summary judgment "is considered a **drastic** relief to be applied with caution (Court's emphasis)." **Id.** at 234.

Summary judgment procedure is generally considered a drastic remedy. **Parmalee vs. Chicago Eye Shield Co., 157 F. 2d 582 (8th Cir. Mo. 1946)**. Summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use. **Brunswick Corp. vs. Vineburg, 370 F. 2d 605 (5th Cir. Fla. 1967)**. Summary judgment is an extreme remedy which should be sparingly employed. **Giordano vs. Lee, 434 F. 2d 1227 (8th Cir. Mo. 1970), cert. denied 403 U.S. 931**.

Summary judgment is a very drastic remedy. **Johnson Foils, Inc. vs. Huyck Corp., 61 F. R. D. 405 (N.D.N.Y. 1973)**. Summary judgment is a drastic remedy to be granted only when the requirements of Rule 56 have been clearly met. **United States vs. Bosurgi, 530 F. 2d 1105 (2nd Cir. N.Y. 1976), cert. denied 449 U.S. 919**. Summary judgment is a tool to be used sparingly and a trial judge should be slow in disposing of a case of any complexity on a motion for summary judgment. **S.J.**

Groves & Sons Co. vs. Ohio Turnpike Comm., 315 F 2d 235 (6th Cir. Ohio 1963). Obviously, the current judges on the Sixth Circuit Court of Appeals have a much different view from their predecessors in 1963.

A motion for summary judgment is granted reluctantly and only in very clear cases. **Union Carbide Corp. vs. Hicks Express Inc., 162 F. Supp. 612 (D.C. Del. 1958)**. See also **Gunther vs. San Diego +A.E.R. Co., 192 F. Supp. 882 (S. D. Cal. 1961)**. Since its impact is rather drastic, summary judgment under Rule 56 must be used with due regard for its purpose and should be cautiously invoked so that no person will be improperly deprived of trial of disputed factual issues. **Watson vs. Southern R. Co., 420 F. Supp. 483 (D.C.S.C. 1975)**. The purpose of Rule 56 is not to cut litigants off from their right of trial by jury if they have issues to try. **Poller vs. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962)**. Summary judgment was not intended to, nor can it deprive litigant of, or at all encroach upon, his right to a jury trail; judges in giving its flexible provisions effect must do so with this essential limitation constantly in mind. **Whitaker vs. Coleman, 115 F. 2d 305 (5th Cir. Ala. 1940)**.

Rule 56 cannot be so applied as to deprive litigant of his right to try any genuine issue by jury or otherwise. **Parmalee vs. Chicago Eye Shield Co., 157 F. 2d 582 (8th Cir. Mo. 1946)**. No matter how enticing, summary judgment cannot short-circuit trial by judge or jury of fact

questions if they are present in the case. **Bros. Inc. vs. W.E. Grace Mfg. Co., 261 F. 2d 428 (5th Cir. Tex. 1958)**. It is especially necessary to be cautious in making determination to grant summary judgment where jury trial has been demanded. **Cameron vs. Vancouver Plywood Corp., 266 F. 2d 535 (9th Cir. Or. 1959).**

In ruling on a motion for summary judgment, a court should be particularly circumspent when the case is scheduled for a trial by jury. **Findeisen vs. North East Independent School Dist., 749 F. 2d 234 (5th Cir. Tex. 1984).** Rule 56 cannot be applied so as to deprive litigant of his right to try any genuine issue by jury or otherwise. **Curtis Publishing Co. vs. Church, Richards & Co., 58 F.R.D. 594 (E.D. Pa. 1973).**

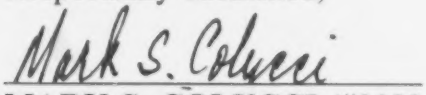
With approximately 50% of all cases in the Sixth Circuit disposed of through summary judgment, and with the Sixth Circuit Court of Appeals upholding these decisions 90% of the time, it is obvious that federal judges in the Sixth Circuit are not bewaring of overkill in granting summary judgments, and are not being cautious in granting them nor only applying it as a very drastic remedy.

Petitioners strongly believe that summary judgment should not have been granted in their case, and that they were denied their right to a jury trial based on the current abrogation of this right within the Sixth Circuit.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners respectfully pray that their petition for a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER AFFIRMING JUDGMENT

Sixth Circuit Case Nº. 96-4286
Filed Dec. 9, 1997

Pages A-1 thru A-1

Case No: 96-4286

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed Dec. 9, 1997
Leonard Green, Clerk

ORDER

MICHAEL GREB; CHARLES J. REIGHARD,
Plaintiffs - Appellants,

v.

GENERAL MOTORS CORPORATION,
Defendant - Appellee.

Before: **MERRITT, BATCHELDER** and **FARRIS**[*]. Judges.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is **ORDERED** that the judgement of the district court be, and it hereby is, affirmed upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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[*]The Honorable Jerome Farris, Circuit Judge for the Ninth Circuit, Sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDGMENT ORDER
AND
MEMORANDUM OPINION

Dist. Court Case Nº. 4:94CV1193
Filed October 23, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed Oct. 23, 1996
Clerk U.S. Dist. Court

Michael Greb, et al., *Plaintiffs*,	)	Case No. 4:94CV1193
	)	
	)	Magistrate Judge
v.	)	David S. Perelman
	)	
General Motors Corp., *Defendant.*	)	**JUDGEMENT ORDER**
	)	

UPON CONSIDERATION OF Defendant's Motion For Summary Judgment,

IT IS HEREBY ORDERED that the said motion is grated, see this Court's Memorandum Opinion of even date, and final judgement is entered in Defendant's favor dismissing Plaintiffs' Complaint.

/s/David S. Perelman
DAVID S. PERELMAN
U. S. Magistrate Judge

DATE: October 23, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed Oct. 23, 1996
Clerk U.S. Dist. Court

Michael Greb, et al.,	)	Case No. 4:94CV1193
Plaintiffs,	)	
	)	Magistrate Judge
v.	)	David S. Perelman
	)	
General Motors Corp.,	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiffs Michael Greb (hereinafter Greb) and Charles Reighard (hereinafter Reighard) bring this diversity action against General Motors Corporation (hereinafter GM or Defendant) advancing state common law claims of intentional tort, fraud, and intentional infliction of emotional distress based upon Defendant's alleged exposure of Plaintiffs to cancer causing chemicals found in machining fluids[1] used in the course of their employment, and Defend-

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[1]Machining fluids are used in the automobile industry as coolants and lubricants. The four categories in which they may be found are straight, soluble, semi-synthetic and

ant's failure to inform Plaintiffs of an increased risk of contracting cancer.[2] Count four of the complaint seeks medical surveillance for early cancer detection.

The claim are based upon the following factual scenario, as gleaned from the record including deposition transcripts and exhibits.

Michael Greb was employed by Defendant from August 24, 1970 to June 1987 in Defendant's Lordstown fabrication plant. During that time Greb used or was otherwise exposed to machining fluid. In approximately 1985 Greb began experiencing respiratory and sinus problems which subsided when he spent time away from work. At the urging of his physician Defendant placed Greb in various different areas of the plant in order to lessen his exposure to chemicals which seemed to be responsible for his health problems. These palliative measures met with no success, and in 1987 Greb took a

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synthetic.

[2]Plaintiffs apparently suffered other work-related ailments such as chemical sensitivity and respiratory troubles. Those ailments, however, have been compensated by worker's compensation and, although mentioned in the complaint, Plaintiffs do not appear to base their allegations of liability on those maladies or seek compensation for them.

leave from his employment with Defendant and has not returned.

Plaintiff Charles J. Reighard commenced employment with Defendant in the van and assembly plant in Lordstown on August 5, 1971. He too was allegedly exposed to machining fluids during the course of his employment. Reighard alleges that his serious health problems began in the early eighties when he began to work in the paint department. He testified that the spray used in that department caused him to suffer from migraine headaches, vomiting, exhaustion, and occasional black-outs. He testified that Defendant refused to acknowledge his illness and refused to take him out of the paint department until after he had spent several months lobbying for reassignment. Once he was reassigned he continued to complain about the effects of the chemicals with which he and other employees worked and, due to these complaints, he was subjected to harassment by the management. He further testified that despite requests from his doctors GM refused to provide information with respect to what chemicals he was being, and had been, exposed to throughout his employment.

In 1985 Reighard took off work due to his chemical sensitivity. At the recommendation of his doctor Reighard went to the Environmental Health Center in Dallas, Texas where he underwent treatment consisting of sauna, vitamins,

and minerals.[3] In 1992 he felt sufficiently recovered as a result of this treatment that he returned to work at GM, where he remains employed.

The basis for GM's alleged liability rests on Plaintiffs' assertion that GM knew that the machining fluids which it required its employees to use increased the risk of cancer but that GM failed to inform its employees of the increased risk or provide appropriate safety measures to alleviate the risk. As proof of GM's prior knowledge and concealment Plaintiffs proffer evidence of two studies performed at GM's behest or with GM's cooperation designed to determine possible links between cancer and certain chemicals and/or materials used in Lordstown or similar locations.

What appears to be the more extensive of these studies is the "Monson study" commissioned in 1983 by the Occupational Health Advisory Board (OHAB)[4] in a "Request for Proposals Concerning the Health Effects of Exposure to Machining Fluids." The stated objective of that

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[3]The Industrial Commission of Ohio turned down his request for reimbursement through worker's compensation of the cost of the treatment he received in Texas.

[4]The OHAB was formed by the GM/UAW National Joint Committee on Health and Safety to oversee and review studies commissioned by GM/UAW. The OHAB consists of six experts in the field of environmental health.

study was to "determine whether current exposure of GM employees to machining and grinding fluids such as soluble oils, non-soluble cutting oils, semi-synthetic, or synthetic cutting fluids or coolants are associated with adverse health effects." The contract for the five year study[5] was awarded to the Harvard School of Public Health and was headed by Dr. Richard Monson who is the director of the occupational health program. The study involved three GM plants in Saginaw, Ypsilanti, and Harmtramak which had been operating since at least the 1940's or 1950's and which made internal car parts such as transmissions, and gears.[6] Approximately every six months a letter was sent from the study group to the OHAB informing OHAB of the progress of the study. A draft final report was issued to the OHAB on December 4, 1991 and the final report was issued on

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[5]The study entailed a one year feasibility study followed by a four year contract for completion.

[6]In deposition Dr. Monson testified that the machining fluids he studied in those three GM plants were not necessarily the same as those used in the Lordstown plant so it is not clear that the results of the Monson study are applicable in the case at bar. For purposes of this motion, however, and because there is some evidence to support Plaintiffs' assertion that all automotive machining fluids are alike, this Court assumes that those fluids studied by the Monson group are relevant to this motion.

October 30, 1992. The OHAB regularly distributed results of health and safety studies to the local GM/UAW health and safety commissions during annual meetings.

With respect to its analysis using standardized mortality ratios (SMRs) the Monson final report stated:

> In the initial SMR analysis, exposure was defined simply as employment in one of the three plants for at least three years. In this first and crudest of the four analyses, the overall mortality rate in the cohort from all causes of death and all cancers combined were similar to that in the U.S. general population. This analysis, however, provided suggestive evidence of elevated risks for several specific cancer sites: cancer of the stomach, large intestine, pancreas, lung, larynx, and leukemia. Based on comparisons with local county population there was also a suggestion of an association with asthma mortality.
>
> In the second stage of the analysis, SMRs were estimated within subgroups of the cohort defined as having ever been exposed to on e of the following: straight oil, soluble oil, synthetic fluids, or grinding operations. Several positive associations between specific cancers and specific types

> of MF [(machining fluid)] exposure were suggested in this analysis. Evidence of associations was observed for straight MF and rectal cancer, larynx cancer, and leukemia. Soluble MF was associated with stomach cancer, pancreatic cancer, larynx cancer, prostate cancer, brain cancer and leukemia. Synthetic MF was associated with leukemia, and grinding was associated with stomach cancer, prostate cancer and leukemia.

In the Findings of the overall SMR analysis it was stated:

> In essence, this first and most crude analysis of the follow-up mortality data showed that the overall mortality rate from all causes and all cancers among the machining fluids cohort was similar to that among the US general population. While it is common for overall mortality rates of employed populations to be 10-20% less than those of the general population[7], these findings do not necessarily indicate an excess rate of mortality among persons working in these GM plants.

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[7]The "healthy worker effect."

Also, the initial analysis shows that there is no evidence for a large excess in mortality from cancer or other causes. Within the limits imposed by mortality studies in general and by this relatively insensitive initial analysis, some degree of assurance is possible that working conditions over the past five decades have not caused a major increase in risk of death from all cancer or other major causes.

However, based on relatively small numbers of deaths, there is some suggestion that excess mortality has occurred from specific causes of death. Even though this is a study of almost 50,000 employees with over 10,000 deaths, the study is not large with respect to relatively rare causes of death. Given that only 20% of the study population was deceased as the end of 1984, it is clear that much more information will be available with continued follow-up of the study cohort. Mortality follow-up every 5-10 years will enable an increasingly stable repeat evaluation of the relation between exposure to machining fluids and cause of death.

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> Overall, the findings suggested a positive association of rectal cancer with straight oil exposure, stomach cancer with soluble oils and with grinding, laryngeal cancer with straight and soluble oils, prostatic cancer with synthetic and soluble MF and with grinding, brain cancer with soluble oils, leukemia with a exposure groupings, and pancreatic cancer with soluble oils.
>
> The above summary focuses on positive associations only. An evaluation as to whether these associations reflect a causal link between machining fluids and cancer requires additional information. One source of additional information is previous studies; another source is internal dose-specific analysis of our data.... On the basis of the external literature, the excess of laryngeal cancer seems the most likely to reflect a causal association.

In discussing the connection between machining fluids and cancer Dr. Monson testified upon deposition as follows:

> Q. Doctor, would it be fair to say that there is nothing whatsoever contained in your final report, your final draft report or your draft final report or

any of your progress reports that would lead to the conclusion that employees of General Motors or others who are subjected to exposure to machining fluids are substantially certain[8] to contract cancer? There is nothing at all in these documents that would indicate that is there, doctor?

***

A. I recall no information that would indicate that there is a substantial certainty that someone would develop cancer.

Q. Have you ever in your professional career ever seen a study that concluded that workers exposed to machining fluids are substantially certain to contract cancer due to that exposure?

A. No.

The second study forming the foundation of this action is the "Lordstown study" which analyzed mortality rates at the Lordstown GM plant. In the preliminary report, dated August 17, 1989, it was reported that:

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[8]"Substantially certain" was defined for Dr. Monson as follows: "there is information available that based upon that information it's almost a certainty that someone exposed to machining fluid is going to contract cancer due to that exposure to machining fluids."

Discussion

The PMR analyses produce similar findings, whether approach #1 or #2 was used. These preliminary results do not lead to clear inferences relating the excess of cancer, in particular cancers of the stomach and pancreas at the fabrication plant, to exposures in the work environment. However, there is the suggestion that it might be work-related, since the excess is not found at the assembly plant nor among salaried employees [sic]. The lung cancer excess is not interpretable without further and more powerful analyses. Refinement of the PMR results including more detailed analysis of the work histories and an investigation of the circumstances of the traffic fatalities may allow for more specific conclusions to be drawn. With some additional data collection, the standardized mortality analysis of the cohort can be undertaken.

Conclusion

The data available for the analysis of mortality at the BOC-Lordstown complex provides the possibility of identifying job classifications or departments with excess causes of death. The findings from this first

phase of the PMR analysis show significantly more stomach cancer deaths than expected among fabrication employees [sic]. There is an overall significant excess of accidental deaths which is largely the result of automobile accidents.

The final report from that study, dated May 13, 1992, concluded:

> The study provided some evidence for a work-related increase in stomach cancer associated with employment in the stamping plant, observing an increased SMR, PMR and MOR [mortality odds ratios]. Based on small numbers, there was increasing stomach cancer risk with duration in stamping and tool and die areas and among maintenance workers. The study provided equivocal evidence for a work-related increase in lung cancer among assembly plant workers, based on a significant plantwide elevation in MOR and an exposure response relationship of increasing risk with total employment duration. The study also provided equivocal evidence for a work-related increase in lung cancer among workers on welding lines in the stamping plant, based on a significant MOR and an exposure response relationship of

increasing risk with duration on welding lines.

Both the final and preliminary reports were made available to GM workers through the union in September 1989 and May 1990.

Based upon the final Lordstown study the OHAB issued a Recommendation that certain follow-up studies should be performed. The Recommendation added that "[n]o additional medical surveillance or agent control measures are warranted based on the findings in this study. The study findings should be communicated to employees." Carmen Pompeii, GM's Senior Industrial Hygienist, averred that all recommendations in the Lordstown report were followed by GM.[9]

With respect to the chronology of the development of their cancerphobia Plaintiffs submitted the following identical averments by way of affidavit:

5. That I first became aware of the real, substantial and specific risks of occupational cancer relating to exposure to machining fluids in December of

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[9]Plaintiff's brief asserts that recommendations made in the Lordstown report were never adopted by GM, in support of that assertion they cite their affidavits. Their affidavits, however, do not contain any averments with respect to that allegation.

1993.[10]

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[10]The December 1993 date may refer to an article in NEWSUAW released on December 9, 1993 which discussed a petition from the UAW to OSHA seeking stricter standards on exposure to oil mists in the workplace. Specifically the article states in part:

> In the petition to new OSHA Director Joseph Dear, UAW President Owen Bieber stated: "There is now sufficient evidence to conclude that exposure to machining fluids poses a risk of occupational cancer and respiratory illnesses at levels well below the existing OSHA limit for oil mist."
>
> The U.S. government estimates that up to 10 million workers are routinely exposed to oil mists from machining fluids. These fluids are used to cool and lubricate metal in machining operations such as the manufacture of engines, transmissions, and other auto parts.
>
> ***
>
> Bieber noted additional joint union company studies of mortality and respiratory effects on exposed workers, laboratory studies of respiratory toxicity, and field studies of exposure control technology are under way at General Motors, Ford, and Chrysler. He added: "We in the UAW are ready and willing to work with employers and government to reduce the health hazards associated with exposure to oil mists."
>
> "In the next few yews, we will know far more about what a safe level of exposure is, about what specific ingredients in machining fluids are causing the problem, and about how to control exposure..."

6. My earlier general concerns regarding the subject of occupational cancer at the Lordstown facility, began at an earlier date, as it pertained to workers in general, and my concerns and activities were of a "political or humanitary" nature, rather than a specific fear of cancer related to machining fluid exposures, which began in December of 1993.
7. That prior to December 1993, I had no confirmed knowledge about the Monson Study's final conclusions regarding exposure to cutting oils or the Lordstown report discussing drawing compounds and machining fluids in stamping operations.
8. That I have reviewed the Monson and Lordstown studies after filing the herein Complaint, and I am a part of the workers involved in the various exposure groups identified in these reports.
9. That from the commencement of my employment at GM until today, I have not been advised to seek early detection for cancer related to occupational

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Plaintiffs submitted this newsletter as their Exhibit 10 without any form of authentication or identification and without specific reference thereto in their affidavits. Defendant has moved to strike this exhibit. Although this Court should grant that motion if the exhibit was intended to represent substantive evidence this Court will let Exhibit 10 stand on the assumption that it is germane to Plaintiffs' claimed knowledge (or lack thereof) of the risk of exposure to machinery fluids.

exposure to machining fluids, that I have a real and reasonable fear of contracting cancer from exposure to machining fluids; that I was further misled by GM as to the risks associated with machining fluids when they failed to inform me of the Monson report and further told all employees in 1992 that there was no real fear of occupational cancer.

Charles Reighard's affidavit includes the additional statement:

8. That on June 25, 1996, 1 was diagnosed with "squamous cell carcinoma in situ" (right hand)....[11]

Defendant has moved for summary judgment contending that there are no genuine issues of material fact which reasonable minds could resolve in Plaintiffs' favor.[12] Defendant contends that Plaintiffs' medical surveillance claim is merely a demand for certain damages arising out of a finding of liability on Plaintiffs' other three claims, and

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[11]Defendant moved to strike Plaintiffs' exhibit 18 which is apparently a doctor's report diagnosing this cancer. Reighard does not allege that this skin cancer is related to hazardous machining fluid exposure. As the medical report is not accompanied by any affidavit as to its authenticity and because there has been no attempt on the part of Reighard to tie this carcinoma to this case, this Court shall grant Defendant's motion to strike Plaintiffs' exhibit 18.

[12]Defendant also argues that Greb's claims are barred by the relevant statute of limitations. By reason of this Court's disposition on the merits of this action no discussion of this argument is necessary.

that its entitlement to judgment on the first three claims leads inexorably to the same result on the fourth.[13]

The disposition of a motion for summary judgment is governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the granting of such motion where, "[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In Celotex Corp. v. Catrett, 477 U.S. 312 (1986), the Supreme Court succinctly stated the standard for granting a motion for summary judgment as follows:

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Id. at 322.

Such showing by the nonmovant must consist of

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[13]In addition to its motion for summary judgment Defendant has moved to strike exhibits 4, 9, 10, 11, 12, 14D and 18 appended to Plaintiffs' brief in opposition to summary judgment. This motion is addressed as the challenged exhibits become relevant to this opinion.

more than a mere "scintilla" of evidence, or the hope that the court will disbelieve the movant's denial of a disputed fact. The non-moving party must present plausible evidence in support of the facts which are deemed material under the substantive law applicable to the cause of action. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989) (discussing the "new era" of summary judgment practice established in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 312 (1986); Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp, 475 U.S. 574 (1986)).

Although the court's function under such a motion is to determine whether a genuine issue of material fact exists, as opposed to endeavoring to resolve any such factual issues, Tee-Pak, Inc. v. St. Regis Paper Co., 491 F.2d 1193 (6th Cir. 1974); 6 Moore's Federal Practice ¶56.15 [1.-0]., the court has discretion in weighing the evidence offered by the non-moving party, considered in light of the record as a whole, to determine whether that party's evidence does "more than simply show that there is some metaphysical doubt as to the material facts" or whether it demonstrates that the non-moving party's claims are "implausible." Street, 886 F.2d at 1479-1480. Further, in making that determination the court has no duty to independently search the record for the existence of genuine issues of material fact. Id. at 1479.

The Ohio standard for adjudicating an employer intentional tort claim was established in Van Fossen v. Babcock & Wilcox Co., 36 Ohio St. 3d 100 (1988), and amended in Fyffe v. Jeno's, Inc., 59 Ohio St. 3d 115 (1991) as follows:

> 5. ... [I]n order to establish 'intent' for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.
>
> 6. To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some

> risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk - something short of substantial certainty -- is not intent.

Id. at 118.

The standard set forth in Fyffe applies to both the Plaintiffs' intentional tort claims and the fraud claims, as fraud is merely a factual allegation upon which an intentional tort may be based. McGee v. Goodyear Atomic Corp., 103 Ohio App.3d 236 (1995) ("although appellant cannot maintain an action for fraud outside the traditional confines of an intentional tort, her action for intentional tort can still be based on fraud.").

In this Court's opinion Plaintiffs' intentional tort and fraud claims must fail because Plaintiffs have failed to demonstrate the existence of a genuine issue of fact with

respect to the second prong of Fyffe, requiring establishment of substantial certainty of injury.

This Court finds three Ohio cases illustrative of the egregious conduct of the employer, as well as the direct link between the dangerous instrumentality or condition and the injury suffered by the employee, necessary to support a finding of employer liability, which is lacking in this action.

In Fyffe, 59 Ohio St.3d at 115, the court found that summary judgment was improperly granted in favor of the employer where a sanitation employee at a production plant was injured as a result of cleaning a conveyor belt while the belt was running. The injury occurred when the employee reached around a "fall guard" to remove an object from within the conveyor and got his arm caught in the moving parts of the machine. In holding that the issue of employer liability should have gone to the jury the court noted that on the night of the accident there was a shortage of sanitation employees, so the plaintiff was pushed to work at a greater than normal speed and to clean the conveyor belt which was not part of his regular duties. Additionally, evidence was presented that it was common practice for sanitation workers to clean the conveyor belts while they were running, and that it was not unusual for a worker to have to reach into the machine to remove a foreign object caught within the mechanism. Indeed, the plaintiff explained that he was taught by his supervisor to clean the belts that way. Moreover, there was a plexiglass safety guard designed to

protect workers from just such injuries as that which befell the plaintiff which was kept in place while the production crew worked on the conveyor belt but which was removed for the cleaning crew. In the accident report filed by his supervisor the plaintiff's injury was reported to have been caused by a "hazardous" procedure, directed or condoned by supervisory personnel. Finally, the Ohio Supreme Court noted that there was evidence that there was a safer way to clean the machines which would have obviated the risk of the type of injury suffered by the plaintiff.

In Ailiff v. Mar-Bal, Inc., 62 Ohio App.3d 232 (1990) the appellate court reversed a directed verdict for the defendant employer in a case in which the plaintiff employee was injured by his exposure to harmful cleaning agents through the course of his employment. The cleaning crew, of which the plaintiff was a member, used the harmful chemical by pouring five to ten gallons of it into a mixing bowl and agitating the machine for ten to forty-five minutes. After the agitation cycle the employee was then required to lean into the bowl and scour it manually. The employees were also instructed to clean their hands using the same chemical. It was undisputed that the president of the defendant company as well as its chemist had been aware of the hazardous effects of the chemical since the 1950's both through direct observation of its effects and by having read materials about. Further, available safety precautions relating to the handling of the chemical,

including use of a breathing apparatus, skin protection and maximum exposure time, although known to the defendant, were not followed. Finally, employees were told that the chemical was safe despite the defendant's specific knowledge to the contrary, and company practices with respect to the chemical were intentionally concealed from OSHA inspectors.

In McGee, 103 Ohio App.3d at 236, the court of appeals reversed a summary judgment in favor of the defendant. The plaintiff argued that the defendant had knowingly exposed her husband, an employee of the defendant, to a known liver toxicant (TCE) throughout the course of his employment.[14] The plaintiff presented evidence, through documents generated by the defendant, that the defendant was generally aware of the toxicity of TCE as early as 1960 and that its effect on the liver in particular was known to the defendants by 1980. As to the defendant's knowledge of the harm the plaintiff submitted evidence that her husband had visited the company doctor who knew of TCE's toxicity to the liver, but that the doctor merely noted his elevated bilirubin and referred him to his own family physician without alerting either the plaintiffs

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[14]The employee's liver problem began in 1978, three years after he commenced employment with the defendant, first manifesting itself by an elevated bilirubin. In 1990 the plaintiff's decedent was diagnosed with cirrhosis of the liver and underwent a liver transplant. He died of complications arising out of that transplant.

decedent or his family doctor to the chemical exposure and its known causal connection to liver disease. The plaintiff presented expert testimony that plaintiff's decedent's liver cirrhosis was caused by TCE and had probably begun as early as 1987, but that the family physician was not in a position to recognize the onset of that illness due to his lack of knowledge relating to toxic exposure. The court concluded that "[t]his is sufficient to raise a genuine issue of material fact whether appellees were substantially certain that continued exposure to TCE vapors would cause appellant harm and, nevertheless, appellees continued to allow him to work in such an environment without securing him adequate medical attention." Id. at 246.

In the opinion of this Court this case is plainly distinguished from the foregoing authorities, in each of which a connection between the harmful instrumentality or product and the harm which was suffered by the employee was manifested through direct evidence demonstrating that the employer either knew of the danger and allowed it to persist or actually created the danger by its own policies, the employees were either actively misled about the danger faced or were instructed to perform duties in a way that compounded, rather than alleviated, the danger. None of those factors are presented on the record before this Court.

Addressing first the second prong of Fyffe, this Court finds that Plaintiffs have failed to present evidence which, when construed in their favor, would allow reason-

able minds to conclude that development of cancer is a substantial certainty based upon their exposure to machining fluids at the Lordstown plant. The scientific documents properly submitted by Plaintiffs simply do not indicate the degree of certainty as to the cancer risk associated with machining fluids which this Court deems necessary to satisfy this prong of Fyffe.

Although both the Lordstown study and the Monson study suggest an association between certain machining fluids and certain types of cancer, neither study unequivocally stated that exposure to machining fluids caused cancer. The reports of "equivocal evidence" and "positive associations" do not rise to the level of substantial certainty. Although GM was obviously concerned about the health risks associated with machining fluids mere awareness of a risk does not rise to the level of substantial certainty. Dr. Monson specifically testified that neither his study nor any other study of which he was aware indicated that exposure to machining fluids is substantially certain to result in cancer. The OHAB also concluded that, based upon the final Lordstown study, no further medical surveillance was warranted.

Plaintiff has presented no expert testimony which contradicts the equivocal nature of the findings in the reports or draws more concrete conclusions as to the risk of cancer. The only evidence submitted by Plaintiffs, other than the two studies, consists of a number of exhibits

purporting to demonstrate both that machining fluids cause cancer and that GM was aware of that causal connection.[15]

Three of these exhibits (Nos. 11, 12 and 14D) are articles allegedly demonstrating "industry wide knowledge of metal fluid exposure and occupational cancer in general." The articles are titled: "The Facts About Occupational Cancer: An Introduction to Cancer in the Workplace;" "Cancer in the Auto Industry: A Map of the Literature;" and "Mortality Studies of Machining Fluid Exposure in the Automobile Industry I: A Standardized Mortality Ratio Analysis."

Defendant has moved to strike these articles from the record for the reason that Plaintiffs have not authenticated the articles by way of affidavit, nor are they deposition exhibits. This Court finds Defendant's contention to be sound, and will grant that motion.

If those articles were properly in evidence this Court would find, for the following reasons, that they do not support the Plaintiffs' position based thereon. First, Plain-

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[15]Plaintiffs argue that the Lordstown report is evidence that GM knew that its machining fluids increased the risk of cancer because the Lordstown report listed as References several publications dealing with employee health in the automobile industry and\or when exposed to certain chemicals. Plaintiffs, however, do not point to any specific information within those references which would have alerted GM to the alleged risks to which it exposed its employees. Therefore, this argument is factually unsupported.

tiffs have failed to present any evidence that GM was aware of the articles, that the articles studied the machining fluids relevant to this action, or that the information contained in the articles was common knowledge among the auto industry. Furthermore, Plaintiffs have not directed this Court's attention to any specific portions of the articles which allegedly supports their position, apparently opting to leave it to this Court to browse through the articles to find something raising a genuine issue of material fact.[16]

Plaintiff's Exhibit 4, also a subject of Defendant's motion to strike, appears to be an open letter written after June 16, 1988 by someone connected with an organization known as Workers Against Toxic Chemical Hazards (WATCH) to a past president of the UAW in which a vague statement about fears about health risks, presumably in the auto industry, said to have been made by that UAW

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[16]Although it is not this Court's function to do so, it did review the articles and found nothing to elevate the possible causal connection between machining fluids to cancer from "equivocal evidence" to "substantial certainty." The one article which appears to go out on a limb and indicate a direct causal relationship only devotes one page to cancer in the auto industry, and is merely a report on studies performed by others, referring to the GM studies involving Dr. Monson. Considering that Dr. Monson testified that neither his own studies nor any of which he is aware indicate with "substantial certainty" a connection between any and all machining fluids and cancer this Court cannot conclude otherwise based on an article written about the report by an author unconnected with the study.

president in 1979 is set forth.[17] This vague exhibit is unsupported or explained by affidavit or otherwise, and, therefore, is of no evidentiary value. Consequently, this Court shall grant Defendant's motion to strike.

Having found that Plaintiffs have not demonstrated the existence of a genuine issue of fact with respect to the second prong of Fyffe, their claims for both intentional tort and fraud must fail.

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[17]The quoted portion of the letter reads as follows:

> If only a fraction of the reports are eventually substantiated, we still face a public health problem of major dimension. If we wait for the final reports before deciding to warn workers of the possible risks, and before taking protective actions, we will lose years of opportunity and sacrifice dozens or hundreds of lives.
>
> We will not relieve the companies and government agencies of their responsibilities in this area. But recent experience shows that we cannot always rely on either for a rapid response to concerns of workers. The UAW needs the independent capacity to investigate quickly and in a planned way.

Although this quote certainly indicates a grave concern relating to the health of auto workers Plaintiffs neglect to inform this Court to what this quote relates or why it should be interpreted as reflecting early knowledge on the part of GM of a cancer risk relating to exposure to machining. This Court regrets that information which could potentially have relevance to this action has been submitted in such a manner that this Court is constrained to disregard it.

Even if that were not the case, this Court would conclude that Plaintiffs' fraud claim would still lack merit.

Plaintiffs' fraud allegations are based upon two statements allegedly made by GM minimizing or denying health risks associated with exposure to machining fluids. The first is found in an article in the August 3, 1989 issue of the Warren Tribune in which a GM manager was quoted as saying that there were "zero hazardous chemicals in the production process" at the Lordstown plant and that the goal of management was to eliminate hazardous chemicals throughout the Lordstown complex. The other is contained in a "Notice to All Employees" concerning the results of the Lordstown study in which a quote from the study stating "No additional medical surveillance or agent control measures are warranted based on the findings in this study" is contained. Plaintiffs assert that these statements constitute fraud on the part of GM.

This Court finds that this evidence does not create a genuine issue of material fact as to GM's alleged concealment of information relating to known health hazards. Plaintiffs have failed to dispute the factual evidence that the reports commissioned by GM/UAW were available to Plaintiffs through their union. Furthermore, the Notice to Employees accurately states what is found in the Lordstown report and was not misrepresented to Plaintiffs. As to the newspaper report, (disregarding the question of proper authentication) it cannot be considered as reflective of

fraudulent concealment considering that the GM employee is quoted as acknowledging that the Lordstown plant uses some hazardous materials.

Plaintiffs next contend that GM's conduct constituted intentional infliction of emotion distress. This cause of action fails.

The standards for establishing an action for intentional infliction of emotional distress were established in Yeager v. Local Union 20, 6 Ohio St.3d 369 (1983) as "one who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for such bodily harm." (Syllabus.)

The outrageous conduct on the part of GM is allegedly its concealment of the dangers of using machining fluids and its knowing exposure of Plaintiffs to materials which were substantially certain to cause cancer. The distress allegedly suffered by Plaintiffs is their fear of contracting cancer.

As this Court has concluded that Plaintiffs have failed to sustain their burden of presenting more than a scintilla of evidence that GM subjected its employees to a substantial risk of contracting cancer, or concealed relevant facts concerning studies examining the health effects of exposure to machining fluids, it necessarily follows that they have failed to demonstrate extreme or outrageous conduct on the part of GM. To the contrary, this record

supports the conclusion that GM took steps to protect its employees from possible health risks by commissioning scientific studies in that regard. Although Plaintiffs baldly assert otherwise, the only actual evidence with respect to remedial measures indicates that GM followed the recommendations in the Lordstown report for lessening hazardous exposure.[18]

Plaintiffs' final claim for medical monitoring is dependent upon Defendant being found liable upon Plaintiffs' other claims. As this Court has found that Plaintiffs have not met their burden of demonstrating the existence of a genuine issue of material fact as to those claims, this final claim must also fail.

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[18]Moreover, with respect to Greb there is no evidence that he actually suffered that degree of mental distress based upon a fear of contracting cancer necessary to establish liability for this intentional tort. Although he visited a psychiatrist for depression he cannot remember whether he ever mention his alleged fear of contracting cancer. When pressed about the ill effects of Defendant's conduct Greb's complaints centered around his respiratory and chemical sensitivity health problems, for which he receives worker's compensation. He could specify no emotional distress caused by fear of contracting cancer other than a vague concern that he has a "fear of not knowing what to expect out of this, this respiratory problem, how bad am I gonna get with it, what stage is it in right now." For that reason, even if Plaintiffs had demonstrated that GM's conduct met the "outrageousness" standard, at least with respect to Greb the intentional infliction of emotional distress claim would fail.

For the foregoing reasons this Court shall grant Defendant's motion for summary judgment.

/s/ David S. Perelman
DAVID S. PERELMAN
United States Magistrate Judge

DATE: October 23, 1996

APPENDIX C

SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

(Effective 1791)

APPENDIX D

RULE 56
FEDERAL RULES OF CIVIL PROCEDURE

Pages D-1 thru D-4

RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing my serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. f on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before t and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all

papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or to further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or deposition to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay

to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; March 2, 1987, effective August 1, 1987.]